NO. 47246-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

ADAM RAMBUR,

Respondent.

BRIEF OF CROSS-RESPONDENT

John A. Hays, No. 16654
Attorney for Respondent

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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STATEMENT OF THE CASE

At about 7:30 pm on September 7, 2014, Lewis County Deputy Susan Shannon was working routine patrol when she was dispatched to a domestic dispute at 211 Riffe Hill Road in Morton, Washington, following a 911 call placed by Sara Cypher, who lives at that residence. CP 147-148. During the 911 call Ms Cypher claimed that her boyfriend Adam Rambur had pinned her to the floor, restrained her arms with his hands to the point she thought he would break her wrists, slapped her, placed his arm across her throat to the point that she could not breathe, had threatened to kill her with a hammer, and had threatened to harm her dog. RP 147-148, 163-165; Identification No. 1; Exhibits 8, 10. Once Deputy Shannon and another deputy arrived they walked onto the back deck of the residence where they encountered Ms Cypher. RP 148, 164-166. At that time Ms Cypher repeated her claims that during a single incident the defendant had slapped her, had pushed on her neck with his forearm to the point that he had interfered with her breathing and at the same time had threatened to kill her. RP 155-156, 165-168,

By information filed on September 8, 2014, and later amended three times the Lewis County Prosecutor charged the defendant Adam Rambur with one count of second degree assault by strangulation or suffocation, one count of unlawful imprisonment, one count of felony harassment, and one count of bail jumping from a class B or C felony. CP 1-4, 20-22, 25, 28, 32-

34. The prosecutor added the last charge after the defendant failed to appear at a court ordered hearing following his arraignment. CP 20-22.

Following trial and deliberation in this case the jury returned the following verdicts: (1) guilty of fourth degree assault as a lesser offense to the original charge of second degree assault, (2) guilty of unlawful imprisonment, (3) not guilty of felony harassment, and (4) guilty of bail jumping. CP 154-162. At sentencing the state argued that the range on the unlawful imprisonment charge was 4 to 12 months upon its contention that the concurrent fourth degree assault conviction qualified as a prior domestic violence offense under RCW 9.94A.525(21)(c). RP 269-270. Based upon this range the state asked for 6 months in jail. *Id.* However, the court rejected this argument, found that the range was 3 to 8 months, and imposed a sentence of 5 months on the unlawful imprisonment conviction. RP 277-278. The court stated the following concerning the determination of the offender score on unlawful imprisonment charge and the sentence it had decided to impose:

> THE COURT: Yes, but on the other hand, he's already been convicted of bail jumping once, and now if he were convicted – if he didn't show up to serve his jail sentence, if I did that, and then he didn't show up, the State would charge him with a new bail jump and that would be a consecutive sentence. How to make a bad situation worse in one easy lesson. All right.
>
> Be the judgment of the Court, with respect to the count 2, Unlawful Imprisonment, I find the offender score to be one. ***It really***

> ***makes no difference.*** It gives a standard range of three to eight months. With respect to sentence, on Count 2, Unlawful Imprisonment, five months, credit for three days. Count 3, Bail Jumping, five months, concurrent time, credit for three days. Assault in the Fourth Degree, five months – excuse me. 364 days, five months concurrent time to serve, balance suspended for 24 months on condition that no similar offenses. Pay the fees, et cetera. The legal financial obligations, $200 filing fee, $500 crime victim, $81. 20 in service, $1800 attorney fee recovery, hundred dollar DNA, hundred dollar DV assessment and a thousand dollar jail fee, payable at $30 a month starting 60 days from his release from jail date. I don't know what that is because he's going to get good time.

RP 277-278 (emphasis added).

The state cross-appealed this decision on sentencing. *See* Notice of Cross-appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO COUNT THE DEFENDANT'S CONCURRENT FOURTH DEGREE ASSAULT CONVICTION AS AN ADDITIONAL POINT WHEN SENTENCING THE DEFENDANT FOR UNLAWFUL IMPRISONMENT BECAUSE THE FORMER OFFENSE CONSTITUTED THE SAME CRIMINAL CONDUCT AS THE LATTER.

Under RCW 9.94A.525(21)(c), prior convictions for "repetitive domestic violence" offenses, including misdemeanors, count as one point when determining the offender score for felony domestic violence offenses if the prior convictions involved a claim and proof of domestic violence after August 1, 2011.

> (21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows: . . .
>
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.525(21)(c).

As the state points out in its cross-appeal, in *State v. Rodriguez*, 183 Wn.App. 947, 336 P.3d 448 (2014), the court of appeals found that a concurrent misdemeanor conviction for a domestic violence offense qualified as a "prior conviction for a repetitive domestic violence offense" for the purposes of adding a point under RCW 9.94A.525(21)(c). However, what

the state did not point out in its brief is that there is a fundamental difference between the facts in *Rodriguez* and the facts in the case at bar. That fundamental difference is that in *Rodriguez* the defendant was convicted of a misdemeanor domestic violence offense and a felony domestic violence offense against two difference persons although both committed at the same time. In the case at bar, the defendant was convicted of a misdemeanor domestic violence offense (fourth degree assault) and a felony domestic violence offense (unlawful imprisonment) against the same person with both crimes committed at the same time. Thus, as the following explains, these two offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a).

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent" for each particular offense. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the "same criminal conduct" for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

> [T]he present case, the "objective intent" underlying the two charges is the same - to deliver the heroin in one or both conspirators' possession. Possessing that heroin was the "substantial step" used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the "same criminal conduct" for the purpose of determining his offender score. The court agreed,

holding as follows:

> Under the facts here, it appears that Williams's primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).
>
> Thus, counsel's decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the state's theory of the case as was borne out by the evidence presented at trial was that the defendant sat on his girlfriend, held her hands down, hit her, strangled her, while at the same time threatening to kill her and her dog with a hammer. Thus, as alleged by the state, the conduct that constituted the fourth degree assault and the conduct that constituted the unlawful imprisonment occurred at the same time, occurred at the same place, involved the same victim, and included the same objective intent. As a result, they constituted the same criminal conduct. Consequently the trial court did not err when it did not use the fourth degree assault conviction to add a point to the offender score on the unlawful imprisonment.

II. ANY ERROR IN CALCULATING THE DEFENDANT'S OFFENDER SCORE ON HIS UNLAWFUL IMPRISONMENT CONVICTION WAS HARMLESS.

When the sentencing court incorrectly calculates the standard range, the proper remedy is remand for resentencing under the correct range unless the record indicates the sentencing court would have imposed the same sentence under the correct range. *State v. Parker*, 132 Wn.2d 182, 937 P.2d 575 (1997). As the following quote from the sentencing hearing in the case at bar reveals, the judge specifically stated that whether the defendant's range was 4 to 12 months as the state argued or 3 to 8 months as the defense argued was irrelevant to him as he would impose 5 months in either event. The court stated:

> THE COURT: Yes, but on the other hand, he's already been convicted of bail jumping once, and now if he were convicted – if he didn't show up to serve his jail sentence, if I did that, and then he didn't show up, the State would charge him with a new bail jump and that would be a consecutive sentence. How to make a bad situation worse in one easy lesson. All right.
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> Be the judgment of the Court, with respect to the count 2, Unlawful Imprisonment, I find the offender score to be one. ***It really makes no difference.*** It gives a standard range of three to eight months. With respect to sentence, on Count 2, Unlawful Imprisonment, five months, credit for three days. Count 3, Bail Jumping, five months, concurrent time, credit for three days. Assault in the Fourth Degree, five months – excuse me. 364 days, five months concurrent time to serve, balance suspended for 24 months on condition that no similar offenses. Pay the fees, et cetera. The legal financial obligations, $200 filing fee, $500 crime victim, $81. 20 in service, $1800 attorney fee recovery, hundred dollar DNA, hundred dollar DV assessment and a thousand dollar jail fee, payable at $30

> a month starting 60 days from his release from jail date. I don't know what that is because he's going to get good time.

RP 277-278 (emphasis added).

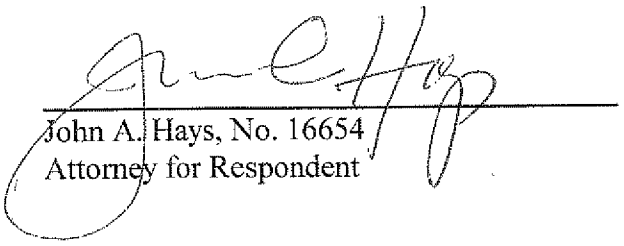
As this quote reveals, the trial court explicitly stated that whether the range was 3 to 8 months or 4 to 12 months, he was going to impose 5 months, which was within both ranges. Thus, any error in miscalculating the offender score was harmless beyond a reasonable doubt.

CONCLUSION

The trial court did not err when it calculated the defendant's offender score. In the alternative, any miscalculation was harmless. As a result, this court should reject the state's cross-appeal.

DATED this 19th day of October, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 9.94A.535(21)

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.589(1)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **ADAM RAMBUR,** **Appellant.**	**NO. 47246-5-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
   Lewis County Prosecuting Attorney
   345 West Main Street
   Chehalis, WA 98532
   appeals@lewiscountywa.gov

2. Adam Rambur
   211 Riffe Hill Road
   Morton, WA 98356

Dated this 19th day of October, 2015, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

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